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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 581

BERNARD D. GROSSMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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No.

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against

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes Now petitioner, Bernard D. Grossman, by and through counsel, and prays this Honorable Court to issue writ of *certiorari* to review the judgment and order of the United States Court of Appeals for the Fourth Circuit, and in support hereof, respectfully shows unto the Court the following:

Opinion Below

The opinion of the United States Court of Appeals for the Fourth Circuit by Winter, J., in *United States* v. *Grossman* was filed July 18, 1968, and is reproduced in the appendix to this petition. (App. A, pp. 1a-8a). Judgment was entered the same day. (App. A, pp. 1a-8a). The opin-

ion has not been officially reported as of the date of filing this petition.

Jurisdictional Grounds

The judgment here sought to be reviewed was entered by the court of appeals on July 18, 1968.

Petition for rehearing was filed with the court of appeals on August 1, 1968, and rehearing was denied on August 30, 1968. (App. A, p. 9a.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether evidence of insubstantial gifts given to a prime contractor's purchasing agent by petitioner with evidence of purchase orders having been awarded by the purchasing agent to petitioner's corporation both before and after these gifts is sufficient to establish the specific intent required by 41 U.S.C. §§ 51 and 54. (Anti-Kickback Act)

2. Whether evidence that petitioner gave insubstantial personal gifts to one purchasing agent and paid by personal check for stock issued to another purchasing agent is sufficient to establish that the gifts or gratuities were made "on behalf of" the corporation of which the petitioner is an officer, as required by 41 U.S.C. § 51.

3. Whether proof that petitioner had knowledge that the purchasing agent's corporation held a negotiated prime contract with the United States is necessary in a prosecution under 41 U.S.C., §§ 51 and 54.

4. Whether occasional gifts of candy, beer, liquor, and cigars given to a purchasing agent of a prime contractor most of which were to be distributed to other employees not involved in the purchasing process constitute "pay-

ments'' of a ''gift or gratuity'' as proscribed by 41 U.S.C., §§ 51 and 54.

5. Whether the district court of indictment and trial in North Carolina had jurisdiction of an offense charged under 41 U.S.C., §§ 51 and 54 concerning a stock transfer which occurred in New York and New Jersey.

6. Whether payment for corporate stock for the accommodation of a purchasing agent constitutes a violation of 41 U.S.C., §§ 51 and 54 where the Government's own witness, the purchasing agent, testified without contradiction that he intended to pay for the stock from the outset and did in fact reimburse petitioner shortly after he received the certificate.

Constitutional Provisions, Statutes Involved

United States Constitution, Article III, Sec. 2.
United States Constitution, Amendment VI.
Rule 18, Federal Rules of Criminal Procedure.
41 U.S.C., § 51.
41 U.S.C., § 52.
41 U.S.C., § 53.
41 U.S.C., § 54.
(Full text in App. B, pp. 1b-3b.)

Statement of the Case

This is a petition to review by *certiorari* a decision and judgment of the United States Court of Appeals for the Fourth Circuit handed down July 18, 1968. The court reversed a conviction of petitioner on a two-count indictment for violation of the Anti-Kickback Act (41 U.S.C., §§ 51 and 54) in the Middle District of North Carolina because of the prejudicial manner in which the U. S. Attorney conducted the trial. and granted petitioner a new trial,

but rejected petitioner's contentions that the evidence on neither count justified submission of the case to the jury, ruling that the motions for judgments of acquittal were properly denied.

Petitioner, an officer of Modern Screw Machine Company (hereinafter referred to as Modern Screw) of Wallington, New Jersey, was indicted in two counts for paying kickbacks to two purchasing agents of Western Electric Co., Inc. (referred to hereafter as Western). The key paragraphs of the indictment are:

> (Count One) 4. That during the years 1961 and 1962, the exact dates to the Grand Jurors unknown, the defendant BERNARD D. GROSSMAN, did knowingly give and cause to be given to Nicholas Sterling Sinhel, an employee and agent of Western, at its Winston-Salem, North Carolina, Plant, approximately two hundred fifty-five pounds of candy, value unknown; cigars, whiskey, and fourteen cases of Foxhead Beer, value unknown, the same being a fee, commission, compensation, gift and gratuity paid on behalf of a subcontractor, namely, Modern Screw, as an inducement for awarding of subcontracts and orders of Western to said subcontractor and as an acknowledgment of subcontracts and orders previously awarded, all in violation of 41 USC 51.
>
> (Count Two) 4. That during the years 1961 and 1962, the exact dates to the Grand Jurors unknown, the defendant, BERNARD D. GROSSMAN, did knowingly give and cause to be given to Walter Roland Clitherow, an employee and agent of Western, at its Winston-Salem, North Carolina, Plant two hundred shares of stock in Developers Small Business Investment Corporation, in the name of Walter Roland Clitherow and paid for by Bernard D. Grossman, in the total

amount of $1,000.00, the same being a fee, commission, compensation, gift and gratuity paid on behalf of a subcontractor, namely, Modern Screw, as an inducement for awarding of subcontracts and orders of Western to said subcontractor and as an acknowledgment of subcontracts and orders previously awarded, all in violation of 41 USC 51.

The Government's Bill of Particulars specified that the cigars and whiskey (Count One) were delivered in person intermittently over the years 1961 and 1962, that the cases of beer were delivered in person during the summer of 1962, that the 255 pounds of candy were delivered in person on November 11, 1962, and that the 200 shares of stock (Count Two) were delivered by means of "personal check to stockbroker." This check was sent from New Jersey to New York.

A number of prime contracts between the Army and Western stipulated as being "negotiated" contracts ("made without formal advertising") were offered into evidence, and several hundreds of purchase orders awarded to Modern Screw were also offered and received in evidence. It was stipulated that petitioner was an officer of Modern Screw during the period in question.

The Government's key witnesses at the trial were the Western purchasing agents Sinhel and Clitherow. Sinhel testified that Modern Screw had been an approved supplier of Western for 25 years and that it performed admirably in supplying Western with precision parts at optimum speed. He stated that he received about 250 pounds of candy from the petitioner around Christmas time which he had distributed throughout the Western plant to various employees. The Foxhead beer, unavailable in the Winston-Salem area, was for a number of Western employees who

had an affinity for that particular brand and Sinhel distributed that also. The cigars were also distributed by Sinhel to various Western employees. Sinhel received the bottles of whiskey at various times from the defendant over the two year period 1961-1962. Sinhel testified that such small gifts were commonly distributed throughout the Western plant by other suppliers. Sinhel testified that the gifts of candy, beer, cigars and whiskey received by him did not induce him to award Modern Screw any purchase orders nor did he consider them an acknowledgment of prior orders and that orders he placed with Modern Screw were so placed because Modern Screw could deliver the precision parts required in the time allotted.

Walter Clitherow, the other purchasing agent, testified that the petitioner told him of certain stock which would be a good investment at $5 per share. Clitherow requested that the petitioner subscribe 200 shares in his name and give his address as his (Clitherow's) mother's address in Averill Park, New York, because both Clitherow and the petitioner thought that the stock could not be sold to a North Carolina resident under laws governing the sale of securities. Acting as instructed by petitioner, Morris Cohon, a New York City stockbroker, sold Clitherow 200 shares and mailed statements to Clitherow's New York address. Clitherow's mother was in California at the time, and therefore did not forward any of his mail to Clitherow in North Carolina. The stockbroker sent two statements to the New York address and made two telephone calls to the petitioner informing him that the stock sent to Clitherow had not been paid for, whereupon the petitioner, in New Jersey, sent the broker, in New York, his personal check in payment for the stock. Then the broker mailed Clitherow's stock certificate to Averill Park, New York. The petitioner told Clitherow not to repay him for the stock until

Clitherow actually received the certificate. Clitherow informed his mother by telephone upon her return from California to forward the certificates to him in North Carolina, which she did. Approximately three weeks after receipt of the certificate by Clitherow in North Carolina, he mailed his check for $1,000.00 to the petitioner by way of repayment. He testified he intended to pay for the stock from the time he and petitioner first discussed it.

The entire stock transaction took place between March, 1962 and July 11, 1962. A cost analysis audit of Modern Screw was begun in August 1961 and continued with a conference at the Western plant, including the petitioner, in April of 1962. However, no investigation of the Western purchasing organization was begun until December, 1962.

The petitioner wishes to emphasize that all of the evidence was offered by Government witnesses. The defendant offered no evidence.

Motions for judgment of acquittal were denied and the jury found the petitioner guilty on both counts and fines and a sentence were imposed. Motions for judgment of acquittal and new trial were denied and the petitioner timely appealed to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit reversed the verdict of the district court and remanded the case for a new trial because of insinuations during the trial by the prosecutor. However, the court further held that the offense involving the stock transaction was committed in the Middle District of North Carolina; that knowledge that the prime contract was negotiated is not an essential element of the offense condemned by 41 U.S.C. §§ 51 and 54; and that the word "payment" in 41 U.S.C. § 54 includes the granting of any gift or gratuity prohibited by 41 U.S.C. § 51. The court failed to rule upon the petitioner's contention that it was incumbent upon the

Government to prove that the alleged gifts were made "on behalf of" Modern Screw and that such proof was conspicuously absent from the record. It also ignored petitioner's contention that proof of the specific intent to induce or acknowledge the award of purchase orders was likewise inadequate.

Petitioner's petition to the court of appeals for rehearing as to the questions of the jurisdiction of the Middle District of North Carolina in this case and of the interpretation of the "on behalf of" language of 41 U.S.C., § 51 was denied, whereupon this petition for *certiorari* was timely filed.

Petitioner concedes that the United States District Court for the Middle District of North Carolina had jurisdiction of the violation of 41 U.S.C., §§ 51 and 54 charged in Count One of the indictment but has consistently maintained that the court had no jurisdiction of the offense charged in Count Two (stock transaction).

Reasons for Granting the Writ

I

This case raises important questions of federal law concerning the meaning of a federal criminal statute of potentially wide application which should be construed by this Court. This Court has never reviewed a criminal prosecution under the Anti-Kickback Act and the Fourth Circuit's opinion establishes substantive law principles which are clearly erroneous and ought to be passed on by this Honorable Court because of the ever increasing scope of Government contract activity.

This Court has only had the civil provisions of the Act before it one time, in *United States* v. *Acme Process Equipment Co.*, 385 U.S. 138 (1966), dealing with the Government's right to cancel a prime contract "tainted" by a

$25,000 kickback, and reversing a Court of Claims decision to the contrary.

The federal Anti-Kickback Act (41 U.S.C. §§ 51-54) was enacted in 1945, applicable only to cost reimbursable contracts, as a measure to prevent the payment of kickbacks in connection with the awarding of Government prime contracts and subcontracts wherein such kickbacks are likely to add to the contract costs. H.R. Rep. No. 212, 79th Cong., 1st Sess. (1945). The Anti-Kickback Act was amended in 1960 to apply only to "negotiated contracts" due to the increased use of this mode of contracting. Negotiated contracts are generally used where the product involved is one not available upon the open market which means that no "going prices" are available for comparison with the contract price, thus rendering such contracts more susceptible to kickbacks. H.R. Rep. No. 1880, 86th Cong., 2nd Sess. (1960).

The award and performance of negotiated Government contracts presently involve extremely large numbers of businesses and individuals as well as an extremely large flow of public funds. "The departments and agencies of the government are awarding contracts at the current rate of about fifty billion dollars a year to procure property and services for use in their programs and activities. The Department of Defense alone is awarding contracts for weapon systems and related equipment and supplies at the rate of over thirty-five billion dollars annually. On the basis of the best available information, we estimate that as much as 80 to 90 per cent of the dollar value of procurement by contract is made by negotiated contracts." *Comptroller General of the United States, Annual Report,* fiscal 1967, page 103. Many of these negotiated contracts, especially defense contracts, are placed with such corporate giants as General Electric Corporation, General Dynamics Corp., American Telephone & Telegraph, Inc., General Motors, and Ling-

Temco-Vought, Inc., *Congressional Quarterly*, May 24, 1968, pgs. 1162-1163. It is apparent that these giant corporations and their various subsidiaries along with all the other large and small Government contractors have points of operation all over the United States and deal with literally thousands of suppliers. In turn, each of these contracts involves many individual transactions which are susceptible to the payment of kickbacks.

Furthermore, the potential application of the Anti-Kickback Act is accentuated by the prevalence in the business world of the practice of "corporate gift giving." A survey conducted by a marketing trade journal during 1967, while its statistical validity may be debated, at the very minimum gives a good indication of the prevailing attitude toward "business gifts." According to that survey, 72 per cent of the businesses contacted gave business gifts. Most of these gifts ranged up to $25 in value with 71 per cent of the individual gifts of less than $10 in value. Forty-six per cent of those firms giving gifts did so for "goodwill" while 54 per cent did so for "appreciation." Such gifts are "kept large enough to say thank you, but small enough not to obligate." *Sales Management*, 99:40, Sept. 10, 1967, pgs. 40-42. Are such gifts, if made by or on behalf of a subcontractor under a prime Government negotiated contract, to be treated as federal criminal offenses under 41 U.S.C. § 54? The Court of Appeals for the Fourth Circuit has ruled in the case at bar that the giving of such gifts as beer, cigars, whiskey and candy does constitute a felony punishable by fine and imprisonment.

Therefore, the need for clear guidelines as to the proper application of the "Anti-Kickback Act", is apparent. Indeed, the Federal Government itself has seen fit to furnish its employees with certain rules as to what gifts they may or may not accept. Federal agency heads are authorized to

permit their employees to accept minor gifts even from persons who regularly have matters within the jurisdiction of their agency. Title 5 *C. F.R.* § 735.202 provides that federal employees are expressly permitted to accept food and refreshments of a nominal value even when on an inspection tour and unsolicited advertising or promotional materials such as pens, pencils, calendars, etc. Without the construction of the Anti-Kickback Act so as to provide such rules of thumb for private business men, the most scrupulous member of the business community may find himself in federal court as a result of giving relatively insubstantial gifts, in accordance wtih business practice, to some employee of a Government contractor. The petitioner's situation is a perfect case in point. Petitioner gave one purchasing agent some small gifts and used him as a conduit for distribution of other small gifts to Western employees who were not involved in the purchasing process. Petitioner gave a stock "tip" to another purchasing agent whom he had known for years and helped him follow through on it. These activities would scarcely lift an eyebrow in the business community, and would normally be viewed as gestures of friendship, yet the petitioner now stands convicted of a federal crime based on them.

In 1958, the United States Department of Justice had this to say about 41 U.S.C. §§ 51 and 54: "The Statute being novel, interpretation of its scope has been rendered most difficult by lack of either judicial authority or guideposts in the legislative history." H. R. Rep. No. 1880, supra. Because the criminal provisions of the Anti-Kickback Act have been interpreted only meagerly to date, it would appear that the foregoing appraisal remains valid. Indeed, a distinguished circuit court judge has commented upon the uncertainty of the law surrounding 41 U.S.C. §§ 51 and 54 and has stated that the courts "should explore in greater depth

the provisions of the Anti-Kickback Act, their meaning, and their application . . ." (Circuit Judge Ely concurring and dissenting in *Moore* v. *United States,* 347 F. 2d 942 (9 Cir. 1965).

Therefore, we respectfully submit, the questions raised in the instant case of great importance to the bench, bar, and the business community which ought to be reviewed by this Honorable Court include the following:

(a) Did Congress intend to condemn giving trivial gifts of insubstantial or unknown value (such as cigars, an occasional bottle of whiskey, or candy) over a period of two years *as a felony,* where there is no connection and no attempt to connect any of these items to any subcontract or purchase order? The criminal provision of 41 U.S.C. § 54, referring back to 41 U.S.C. § 51 (the "civil" provision), specifies that knowingly making or receiving any such prohibited *payment* shall constitute a felony, while the civil provision (41 U.S.C. § 51) proscribes the "payment of any fee, commission or compensation of any kind *or* the granting of any gift or gratuity." (emphasis supplied) Admittedly, a gift of substantial value, or one connected or related to a subcontract or purchase order in point of time or by way of value (as a percentage commission or fee), could constitute a *payment.* But can a cigar, or bottle of whiskey, or candy for everyone in the plant at Christmas, or 14 cases of beer to a group of employees, constitute the payment of a *kickback* where these gifts are alleged to be of "value unknown," are not connected to any purchase order or group of purchase orders, and are not considered by the Government's witness (the purchasing agent) to have been an inducement for the award of purchase orders or an acknowledgment of purchase orders already awarded? Where is the line to be drawn? Would picking up the tab at lunch or giving a package of cigarettes subject an honest businessman to prosecu-

tion and conviction for *felony*, simply because the luncheon guest or recipient of the cigarettes is an employee of a Government contractor?

(b) If the only requirement of guilty knowledge is that the defendant know he is giving a gift to an employee of a Government prime contractor, and that he gives the gift with the intent of inducing or acknowledging purchase orders, (all being elements required by the civil provision giving the Government the right to sue and recover the value of the gifts), has not the requirement of knowledge in the criminal provision been rendered surplusage, of no meaning? The criminal provision (41 U.S.C. § 54) specifies that "any person who shall *knowingly*, directly or indirectly, make or receive any such prohibited payment . . ." Only *negotiated* prime contracts ("made without formal advertising" 41 U.S.C. § 52) are covered by the Anti-Kickback Act. *Morisette* v. *United States*, 342 U.S. 246, 271 (1952) indicates that an accused must have "knowledge of the facts—if not the law—which make his conduct criminal." Unless the prime contract is negotiated, there can be neither *civil nor criminal* violations of the Act. An accused could not consciously give a gift to an employee of a Government contractor for the purpose of inducing or acknowledging the award of a purchase order without *knowing* that he was doing so. Yet, the Fourth Circit has ruled that the word "knowingly" in the criminal statute means nothing more than this, rendering it complete surplusage, and attributing to Congress the foolish intention of inserting a meaningless word in a criminal statute, a word which normally is freighted with meaning. 21 Am. Jur. 2d. *Criminal Law* § 88.

(c) Where trivial gifts are given or a stock purchase accommodation is made for employees of a prime contractor which regularly awards purchase orders to petitioner's sub-

contractor and has done so for decades, and no attempt is made to connect the gifts or stock purchase accommodation to any purchase order or group of purchase orders in point of time, by value or in any other way, can the specific felonious intent to induce the award of future orders or to acknowledge the award of past orders simply be inferred beyond a reasonable doubt from the fact the gifts were given and the orders had been awarded?

In *Howard* v. *United States*, 345 F. 2d 126 (1 Cir. 1965), the First Circuit Court of Appeals held that the intent requirement of the Federal Anti-Kickback Act called for proof by the government that the gift was given with knowledge that its purpose was "as an inducement for the award of subcontracts or orders" under a prime negotiated Government contract. In the case at bar, the Fourth Circuit Court of Appeals held that the presence of the word "knowingly" in Section 54 requires that the Government prove that "defendant knew that he was making a payment in order to induce the contract to be awarded to Modern Screw." These statements of the intent requirement of 41 U.S.C. § 51 and 54 are wholly reasonable interpretations of the language of the Act so far as they go. The petitioner respectfully submits that 41 U.S.C. § 51 should be properly interpreted in terms of its requirement that there be a specific intent to induce or acknowledge the award of purchase orders so as to have no application to small insubstantial gifts given to employees of Government contractors.

The offense condemned by the Anti-Kickback Act has been properly analogized to the offense of bribery as set out in 18 U.S.C., §§ 201, *et seq.* *Howard* v. *United States*, *supra.* The general rule is that a bribe must involve something of value with sufficiency of value being determined by the application of a subjective test which is necessarily a part of the test for intent. The requirement of value is satisfied if the jury can reasonably infer that the defendant

considered his bribe offer of sufficient value to accomplish his purpose. 12 Am. Jur. 2d *Bribery* § 7; *Commonwealth* v. *Hayes,* 311 Mass. 21, 40 NE 2d 27 (1942). The petitioner submits that, as a matter of law, no reasonable person would make small gifts of candy, beer, cigars or liquor expecting thereby to induce or acknowledge the award of multi-thousand dollar contracts. No businessman would believe such gifts sufficient to influence the granting of such a contract. In fact, the evidence in petitioner's case tends to negative the existence of such intent, as Modern Screw had been an approved supplier of Western's for years and apparently the engineering department often expected Sinhel to buy from Modern Screw. Therefore, there was no apparent need to bribe the purchasing agents.

Petitioner is keenly aware that it is not the province of this Court to weigh testimony; however, the petitioner respectfully points out that this Court has in the past ruled upon whether there exists in the record of a case such "substantial evidence . . . which, if believed by the jury, would justify the submission of the issues to it," which sufficiency of evidence is necessary to support the judgment of the trial court. *Stilson* v. *United States,* 250 U.S. 583 (1919). "Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB* v. *Columbian Enamelling & Stamping Co.,* 306 U.S. 292 (1939), cited in *United States* v. *United States Gypsum Co.,* 67 F. Supp. 397. This Court has also ruled that a complete lack of evidence of guilt on a criminal prosecution raises serious due process questions. *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960).

(d) If a trivial gift is given or a stock purchase accommodation is made as a personal matter between business acqaintances and there is no evidence that the cost of the

gifts is borne by the corporate subcontractor, can these things be said to have been accomplished "on behalf of" the corporate subcontractor?

Section 51 of the Anti-Kickback Act prohibits payment of compensation or gratuities of any kind, directly or indirectly, *by or on behalf of* a subcontractor to any agent or employee of a prime contractor for the purpose of inducing or acknowledging the award of a subcontract. 41 U.S.C. § 53 gives the General Accounting Office the power to inspect the records of any prime contractor or subcontractor for the purpose of ascertaining whether such prohibited payments have been paid or granted by a subcontractor. Section 54 makes it a federal crime to knowingly receive or grant any such prohibited payments. In the case at bar, petitioner was charged in both counts of the indictment with making such prohibited payments "on behalf of a subcontractor, namely, Modern Screw." However, no evidence whatsoever appears in the record to show that the gifts charged by the indictment were anything other than *personal* gifts of the petitioner made on his own behalf and paid for by him. There is no evidence in the record connecting the subcontractor, Modern Screw with the making of the alleged payments or with ultimately bearing the expense.

The decision of the Ninth Circuit in *Moore* v. *United States, supra,* highlights the requirement that prohibited payments under 41 U.S.C. § 51 be made either "by" or "on behalf of" the subcontractor.

No proof that the alleged payments were made on behalf of Modern Screw appears in the record here despite the fact that the General Accounting Office had full power under 41 U.S.C., § 53 to examine the records of Modern Screw to determine whether the alleged payments were in fact made on behalf of Modern Screw.

Petitioner respectfully submits that by failing to rule on the petitioner's contentions as to the "on behalf of" requirement of 41 U.S.C. § 51, as set forth by the Ninth Circuit Court of Appeals, the court below has fully sanctioned the application of a criminal penalty to the petitioner under the terms of a federal statutory provision without requiring the Government to prove all elements of the statutory crime created thereby. This amounts to a repudiation of the decision in *Moore* v. *United States, supra,* which specifically recognizes that required element. Furthermore, lack of evidence in a criminal prosecution raises due process questions. *Thompson* v. *City of Louisville, supra.*

II

This Honorable Court should grant *certiorari* in the exercise of its supervisory powers over the federal courts to prevent manifest injustice, namely, prosecution and punishment of petitioner by a court without jurisdiction of the offense charged.

The Fourth Circuit and the district court in this case have completely ignored the time-honored and well-established rule that a bill of particulars binds and limits the prosecution to what is alleged therein. *United States* v. *Haskins,* 345 F. 2d 111, 114 (6 Cir. 1965); *United States* v. *Glaze,* 313 F. 2d 757, 759 (2 Cir. 1963); *Land* v. *United States,* 177 F. 2d 346, 348, 349 (4 Cir. 1949) 27 Am. Jur. *Indictments and Information* § 112. This goes to the constitutional right of the accused to be informed of the charge against him and he certainly may rely upon the averments of the bill. Here, the Government specified in its bill that the "manner of delivery of the gift" of stock to Clitherow was "personal check to stockbroker." The proof showed without contradiction that this check went from New Jersey to New York. Hence, the alleged kickback payment could not possibly

have occurred within the Middle District of North Carolina! Yet the Fourth Circuit does not even refer to this contention of petitioner in its opinion.

The court below, instead, ruled that the offense charged in Count Two of petitioner's indictment (the stock transaction) occurred in the Middle District of North Carolina, the domicile of the purchasing agent who was the transferee of the stock. The petitioner respectfully submits that this ruling is erroneous and thus deprives the petitioner of his right to have the offense tried in that district in which it occurred as guaranteed by the Constitution. *U. S. Const.* art. III, § 2; U. S. Const. amend. VI. The Court below, citing no authority, based its decision as to this question upon the purported nature of stock as intangible personal property, the situs of which, as assumed by the law, is the state of residence of the owner or transferee of the stock.

While as a general rule intangible personal property is considered under the law to have its situs in the state of its owner's domicile, this is not true as to intangible personal property which by law and commercial usage is normally considered to be embodied in tangible form (i.e., stock certificates). 16 Am. Jur. 2d *Conflict of Laws* § 35. Stock certificates are normally considered to constitute in tangible form the shares of stock they represent. *Direction der Disconto-Gesellschaft* v. *U. S. Steel Corp.*, 267 U. S. 22 (1925). This rule has special significance in light of the fact that both states which had "contact" with the stock transfer here in question operated at the date of that transfer in 1962 under the Uniform Stock Transfer Act. *Uniform Stock Transfer Law, N. J. S. A.* 14:8-23, et seq. and *N.Y. Personal Property Law* § 162 et seq. (McKinney 1962) New Jersey was the state in which the corporation issuing the stock was domiciled, and New York was the state in which the brokerage transaction took place. The general rule that questions relating to the title and transfer of corporate stock

are to be governed by the law of the corporation's domicile is also applicable in jurisdictions in which the Uniform Stock Transfer Act has been adopted. The minority rule is that the law of the jurisdiction of transfer governs. See Annot., 131 A.L.R. 192 (1941). In any event, both of the jurisdictions involved in the case at bar were governed by the provisions of the Uniform Stock Transfer Act in 1962.

The Uniform Stock Transfer Act makes *delivery* of stock *certificates* an indispensable element of transfer of title to shares of stock and specifically excludes transfer upon the books of the corporation as a necessary element to transfer of legal title. *Manna* v. *Pirozzi,* 44 N. J. Super. 227, 130 A. 2d 55 (1957); *Parker* v. *Colonial Bldg. & Loan Ass'n,* 111 N. J. Eq. 49, 161 A. 353 (1932). This delivery requirement has been accorded special meaning where the stock transferred is subject to a *gift,* as is here charged in the indictment. *Parker* v. *Colonial Bldg. & Loan Ass'n, supra.* Transfer of legal title to stock under the Uniform Act *cannot* be accomplished by mere transfer thereof on the corporate books. *Fidelity Trust Company v. Newark Milk and Cream Co.,* 89 N. J. Eq. 224, 108 A. 54 (1918). Delivery, and thus transfer, can be accomplished to the donee's agent acting on the donee's behalf. *Parker* v. *Colonial Building & Loan Ass'n, supra.*

In the case at bar, both the transferee's mother, whom he instructed to forward the certificates, and the broker, who acted under the law in his behalf in acquiring the shares, were his agents for purposes of delivery of the shares. Both acted for him in the State of New York. The opinion of the court below (infra, App. A, pp. 1a-8a) states that they were Clitherow's agents! Once any of these parties accepted the duly registered certificates to be transmitted to the transferee, delivery and transfer of legal title to the shares were complete. Acceptance of the certificates by both of these agents of the transferee took place in New

York. The certificate and, therefore, the shares themselves, were located in New York when the transfer occurred. The legal right of the transferee to the stock was wholly perfected in New York; therefore, it can only be concluded that the alleged payment or granting of the gift of stock was completed in New York. The Government has long contended that the offense here was complete when the transfer was complete. The petitioner submits that the "actual transfer of the money (here, stock) at the time and place where it occurs, accompanied by the unlawful intent," as required by *Krogmann* v. *United States,* 225 F. 2d 220 (6 Cir. 1955) to establish the location of the analogous offense of bribery, was complete and accepted by the transferee through his agents in New York. Since the completed transfer and, therefore, the offense occurred in the State of New York, the offense charged in Count Two of the indictment should properly have been tried in the federal courts of New York, which, under the Constitution, were the only courts with jurisdiction.

Conclusion

The decision finally reached by this Court in the case at bar will have consequences reaching throughout the American business community because of significant part which the United States Government plays in the economic life of the nation. If *certiorari* is granted, the guideposts set up by this Court will be anxiously awaited by the businessmen who deal with the federal government by means of the contracting process as well as by the bench and bar who must resolve the civil and criminal disputes which arise out of this contracting process. Petitioner's case indeed represents an ideal opportunity for this court to interpret the statute which was intended by Congress to set ethical bounds around contractual dealings between the Government and

contractors in a primarily private sector of the economy. The court below has clearly disregarded the intended purpose of the Federal Anti-Kickback Act by applying it to relatively insubstantial gifts, and by ignoring the requirement expressly contained within the statute and alleged in the indictment that a gratuity be given on behalf of the subcontractor. Furthermore, the lower court has sanctioned the Middle District Court of North Carolina in exceeding the proper bounds of its jurisdiction under the United States Constitution and has read the requirement of guilty knowledge out of 41 U. S. C. § 54. Though the court below has reversed the conviction of the petitioner and remanded the case at bar for a new trial on other grounds, it has in so doing remitted a mandate to the trial court as to the questions above discussed which will be binding upon the petitioner as the law of the case upon retrial and which will deprive the petitioner of his right to a trial free from substantial error.

It is, therefore, respectfully submitted that this petition for writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit should be granted.

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